

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEE DANIELS,

Defendant-Appellant.

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UNPUBLISHED

April 29, 2008

No. 272218

St. Clair Circuit Court

LC No. 05-002849-FC

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of armed robbery, MCL 750.529, three counts of felonious assault, MCL 750.82, and one count each of carjacking, MCL 750.529a, possession of a short-barreled shotgun, MCL 750.224b, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and fourth-degree fleeing and eluding, MCL 257.602a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 25 to 40 years' imprisonment for the armed robbery convictions, and 3 to 15 years' imprisonment for the felonious assault, possession of a shotgun, and fleeing and eluding convictions. In addition, the trial court sentenced defendant to consecutive terms of 25 to 40 years' imprisonment for the carjacking conviction and two years' imprisonment for the felony-firearm conviction. The trial court also ordered defendant to pay various costs and fees, including court-appointed attorney fees. We affirm defendant's convictions and the terms of imprisonment imposed by the trial court, but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for further proceedings.

Defendant's convictions arise from the November 11, 2005 armed robbery of Vinny's Market in Port Huron. Shortly before the market closed that evening, a man wearing a dark-colored ski mask and holding a sawed-off shotgun entered. He instructed the market's two employees to get down on the floor, and two accomplices also wearing dark ski masks entered the market. The intruders ordered the employees to move to the floor behind a counter, where one of the masked men used tape to bind the employees' hands and feet. While the intruders tried to empty the cash register and searched for the safe, a customer emerged from a Ford Taurus parked in an adjacent lot, and walked toward the market entrance. One of the intruders saw her, pulled her into the market, took her purse, and threw her on top of the bound employees.

A robber then approached the parked Taurus, where the captured customer's boyfriend sat awaiting her return. The robber pointed a sawed-off shotgun at the boyfriend, and ordered him to join the other victims on the floor of the market.

Three witnesses sitting in a nearby vehicle saw the masked man force the Taurus's occupant into the market at gunpoint. The witnesses also described that the man, who wore a gray ski mask, pointed a shotgun at them and advised them "to get out of there." They continued to watch as the robbers fled the market in the Taurus and another vehicle. The witnesses drove after the robbers, describing their location to the police via cell phones while they followed the robbers' cars. The police intercepted the Taurus in a shopping mall parking lot. Defendant jumped out, and led police on a short chase before being arrested. The police found in or near the Taurus coins, cash, a ski mask, a sawed-off shotgun, and a purse belonging to a market employee.

On the date set for the trial, defendant's court-appointed counsel advised the trial court that defendant had retained counsel, and requested an adjournment. Court-appointed counsel explained that he had telephoned and spoke with defendant's retained counsel, and informed the court as follows:

I asked [new counsel]: Then are you going to be entering your appearance and representing [defendant]? And he said: Well, if the case is adjourned and he is paid more money, he would do so.

That's —those are his words . . . .

And so I think that with these circumstances, Judge, an adjournment would be in order. [Defendant] is not ... prepared and he assumed that he had a new lawyer . . . .

The trial court noted that it had previously adjourned the trial several times but granted defendant's request, and advised defendant that he would have 30 days to secure new counsel. The trial court believed "that should be fair to your attorney to do what he or she has to do, but he has to do it quickly."

On the next trial date, defendant again appeared with his court-appointed counsel, who requested that defendant be permitted to speak to the trial court in chambers regarding his efforts to retain new counsel. The trial court declined to speak with defendant. Court-appointed counsel explained, "[Defendant] says to me it's just an issue of money. His wife just settled a lawsuit and hasn't gotten the proceeds yet." The trial court again refused to speak with defendant, and the parties proceeded with jury selection. After jury selection, the trial court revisited the issue of defendant's desired representation. The trial court emphasized that it had received no contact by another attorney, the trial was "ready to proceed," and defendant had not demonstrated good cause for another adjournment.

Defendant first contends on appeal that the trial court's denial of his request for an adjournment violated his due process right to be represented by the counsel of his choice. We review for an abuse of discretion a trial court's denial of a motion for adjournment to retain new counsel. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). However, to the

extent that defendant's argument implicates his constitutional rights, our review is de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

The Sixth Amendment affords a defendant who does not require appointed counsel the right to choose who will represent him. *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988). However, "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Id.* Because defendant never retained counsel and utilized the assistance of appointed counsel throughout the trial, the denial of his motion for a continuance did not violate his Sixth Amendment rights.

A criminal defendant has a due process right to be afforded a reasonable time and opportunity to secure counsel. *Powell v Alabama*, 287 US 45, 52-53; 53 S Ct 55; 77 L Ed 158 (1932). The denial of a continuance to retain counsel rises to the level of a constitutional violation when there is an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' . . . ." *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983), quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964). Whether a court's denial of an adjournment is so arbitrary as to violate due process "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar, supra* at 589. Trial courts are entitled to exercise "broad discretion" when ruling on requests for adjournments, *Morris, supra* at 11, and if a court chooses a result that falls within the range of reasonable and principled outcomes, it does not abuse its discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

When reviewing the denial of a defendant's motion for a continuance to substitute counsel, this Court considers five factors: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney; (3) whether the defendant was negligent in asserting the right; (4) whether the defendant is merely attempting to delay trial; and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

Defendant here predicates his assertion of a due process right to an adjournment on the argument that the trial court should have afforded him more time to retain an attorney. Although defendant has asserted a constitutional right, he has not demonstrated a legitimate reason for asserting the right. Defendant's appointed counsel represented him from the inception of the case until it concluded, briefed and argued several pretrial motions, and brought two interlocutory appeals. The record does not reveal evidence of a dispute between defendant and his appointed counsel. Additionally, nothing in the record suggests that another attorney ever contacted the trial court, filed an appearance, or spoke with appointed counsel a second time about the substance of the case. The record instead reveals that defendant lacked the resources to retain an attorney, and that the proceeds of his wife's lawsuit were used to pay outstanding medical bills and delinquent taxes. Defendant therefore failed to demonstrate a legitimate reason for seeking an adjournment to obtain substitute counsel.

Further, defendant failed to advise the trial court of his alleged difficulty in retaining counsel until the morning of the new trial date, and thus negligently asserted his due process right. Defendant has made no argument regarding potential prejudice, and our review of the

record reveals none; appointed counsel vigorously and competently represented defendant. The trial court's decision to proceed with trial without further delay comported with the range of reasonable and principled outcomes, and consequently did not constitute an abuse of discretion. *Babcock*, *supra* at 269. In summary, we conclude that the trial court did not violate defendant's due process rights when it denied him a second adjournment.

Defendant next argues that the trial court erred by improperly scoring the offense variables based on disputed facts that the prosecutor did not charge or prove beyond a reasonable doubt to a jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has held that Michigan's true indeterminate sentencing scheme does not violate *Blakely*. *People v Harper*, 479 Mich 599, 644; 739 NW2d 523 (2007); *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006). Defendant's complaints regarding the length of his sentence and the scoring of the offense variables therefore lack merit.

Defendant additionally contends that the trial court violated his due process rights by ordering him to repay court-appointed attorney fees totaling \$5,806.99, without considering his current ability to pay. At his sentencing, defendant failed to object to a judgment imposing attorney fees. This Court granted defendant's motion to remand premised on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004).<sup>1</sup> On remand, defendant presented evidence that he earned only a minimal income in prison and had no assets. The trial court refused to reduce or eliminate its assessment of attorney fees, explaining as follows:

... I don't think *Dunbar* tells me that I'm obligated to forever give up on looking to reimburse, if that is a possibility, for the monies the people have paid to an attorney to represent him or her for trial, and just so the record's sort of... it's not unheard of to have the possibility of one—sometimes I use the example of hitting the lottery, just for example. It costs a dollar to buy a ticket and lo-and-behold for the investment of a dollar even I might win a million dollars and as long as that possibility exists I don't think *Dunbar* suggests that I should, therefore, summarily give up on the right to reimburse the people for the costs of the services that were rendered to the Defendant, which I look out I'll say it again,—maybe for me I'll say it again—I look out very jealously. I want the defendants who are charged with crime no matter how serious that crime may be with the appropriate assistance that he or she otherwise would not be able to receive at trial and I don't think that in my ruling, which I've been trying to pronounce here, to suggest that.

The trial court properly considered defendant's ability to pay court-ordered attorney fees, as required by this Court in *Dunbar*. But the trial court's reliance on the purely speculative and highly unlikely possibility that defendant might someday win the lottery conflicts with the holding in *Dunbar* that "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendants *foreseeable* ability to pay." *Id.* at 255 (emphasis in original). The evidence presented at the hearing conducted on remand reveals that defendant has

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<sup>1</sup> *People v Daniels*, unpublished order of the Court of Appeals, entered April 20, 2007 (Docket No. 272218)

no present ability to repay the attorney fees and likely will remain incarcerated for the rest of his life. Because we detect no reasonably foreseeable circumstance that could enable defendant to pay court-ordered attorney fees, we vacate the trial court's attorney fee reimbursement order.

We affirm defendant's convictions and the resultant periods of incarceration the trial court imposed. We vacate only the trial court's attorney fee reimbursement order, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Stephen L. Borrello

/s/ Elizabeth L. Gleicher